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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 IMMIGRATION JUSTICE CLINIC
4 OF THE BENJAMIN N. CARDOZO
SCHOOL OF LAW,

5 Plaintiff,

6 v.

12 Civ. 1874

7 UNITED STATES
8 DEPARTMENT OF STATE,

9 Defendant.

October 17, 2012
9:45 a.m.

10 Before:

11 HON. GEORGE B. DANIELS

12 District Judge

13 APPEARANCES

14 LINDSAY NASH
15 BETSY GINSBERG
Attorneys for Plaintiff

16 PATRICIA L. BUCHANAN
17 Attorney for Defendant

18 (Case called)

19 (In open court)

20 MS. NASH: Lindsay Nash, Immigration Justice Clinic.

21 MS. GINSBERG: Betsy Ginsberg for the plaintiff

22 Immigration Justice Clinic.

23 MS. BUCHANAN: Good morning, your Honor. Patricia

CAH7IMMC

1 Buchanan for the U.S. Department of State.

2 THE COURT: Good morning, Ms. Buchanan. I have
3 reviewed pretty much all of the cases that were submitted, and
4 I'm on the verge of issuing a written opinion. Let me indicate
5 to you now that, Ms. Buchanan, my position is I don't see any
6 case that stands for the proposition that you are putting forth
7 here that this is somehow pertaining to the issuance or denial
8 of a visa. There is no issuance, and there is no denial of a
9 visa, and it seems to me that that language is clear. And the
10 revocation of a visa is in a totally different section, so even
11 if I were to apply that, it still is not even related to the
12 revocation of a visa.

13 So, the argument that you have made is that if this
14 was not in the visa class file it would be disclosable; because
15 it's in the visa class file, that gives it protection, even
16 though there is no assertion that the information was either
17 gathered to make a visa determination, that it was utilized in
18 making a decision to either reject or issue a visa.

19 Even if I were to accept the interpretation that you
20 are putting forth, your interpretation would be that because
21 it's related it could possibly be related to a possible visa
22 application and, therefore, for that reason be put into the
23 visa file, that that would make it confidential. But the
24 statute doesn't say that it's confidential because it pertains
25 to a visa; it says it's confidential because it pertains to the

CAH7IMMC

1 issuance or refusal of a visa, which I can't say that that
2 language is superfluous. It's got to be either the issuance or
3 the refusal of a visa. The only way it seems to me to
4 interpret that language is it is in fact utilized in making
5 such a judgment, and the rationale behind that would be that
6 the agency is entitled to protect its decision-making process.
7 That seems to be the logic of it.

8 I don't see any case that would stand for the
9 proposition that simply because the argument is made that it is
10 kept in case it may be relevant if a visa application is made
11 and, therefore, it's kept in the class visa file, I don't see
12 any case that stands for the proposition that that falls within
13 the statute.

14 Even if I would stretch the argument, the argument
15 would be even if it wasn't in the class visa file, as long as
16 the agency kept it and said we're keeping it in case we need it
17 for some purpose, including if we decide if an application is
18 made for a visa, that that in and of itself would give it
19 confidentiality and protection under the statute. That's not
20 what the statute says.

21 The statute doesn't say because you have it and you
22 think you might use it if a visa application is ever made, you
23 can make it confidential. If that's not the case, it is a
24 stretch, and I think I would be the first judge to say so, that
25 in addition to that simply because it's put in the class visa

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1 file because you believe that might be the case, that somehow
2 it is now cloaked with the confidentiality protection that the
3 statute provides for information that pertains to the issuance
4 or the refusal of a visa. And here we have neither the
5 issuance nor the refusal of a visa, nor an application for the
6 issuance of a visa, nor any use by the agency to consider when
7 a visa should be issued.

8 So, I see no analogous situation in any of these cases
9 that would indicate that the statute was intending to make
10 confidential documents that are simply held and one could argue
11 that it might be quote relevant to a possible visa application
12 even though one does not exist.

13 So, I will probably today or tomorrow go ahead and
14 issue a quick written opinion to that effect. What I will do
15 is I will -- I do not think that there is a basis for me --
16 well, I'm not going to say that. Let me take that back.

17 I struggled with how you want to proceed, but I'm
18 going to give you that opportunity. What I am going to say is
19 that you should provide within 60 days of receiving the
20 opinion -- which probably will be today or tomorrow, clearly
21 this week -- you should provide the document to the plaintiff.
22 Obviously that will give you plenty of time, gives you
23 statutory time to file an appeal. If you want to seek a stay
24 of that order, then you can make a decision whether or not you
25 are going to appeal and whether you are going to seek a stay

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1 from the Second Circuit and/or this court in terms of
2 proceeding. Obviously it is an issue that is somewhat novel,
3 and it is an issue that either way sets some precedent in terms
4 of how to handle these cases.

5 But a strict reading of the statute, and giving
6 meaning to all of the words of the statute, it doesn't appear
7 to me that the circumstances under which this information was
8 gathered or retained was related to in any way, or pertains in
9 any way, to the refusal or the issuance of a visa. And that's
10 what specifically the statute provides.

11 So, I clearly don't think the cases in the grand jury
12 circumstances are applicable to this case. I think this is
13 clearly a straight statutory interpretation. And I haven't
14 even looked at the revocation circumstances. This may or may
15 not be similar analysis, but revocation is dealt in a totally
16 different statute, and the confidentiality and the ability to
17 refuse to turn over this information under FOIA is clearly a
18 statutory right that's explicitly provided.

19 So, I think the interpretation has to be consistent
20 with FOIA, that it has a broad disclosure and any of these
21 exemptions are to be narrowly construed in reading the plain
22 language of the statute, the underlying statutory intent
23 underlying the statute.

24 So, that's basically my position at this point. So,
25 you can anticipate how you are going to proceed, but, as I say,

CAH7IMMC

1 depending on when I get out of court today, today or tomorrow I
2 will go ahead and issue an opinion and have it up on ECF, so
3 you can make a judgment. I clearly will give you 60 days to
4 determine what you want to do, how you want to proceed at this
5 point.

6 Why don't you just wait -- unless there is something
7 you want to put on the record now. Either by letter
8 application or by motion you can let us know what you want to
9 do within that 60 day period, if you are not just going to go
10 ahead and turn it over in that time period, or work something
11 else out with the plaintiffs in terms of resolving this issue.

12 Is there anything else we need to address?

13 MS. BUCHANAN: Let me just say, thank you, your Honor
14 for giving us an opportunity to submit the supplemental
15 briefing, and we appreciate your thoughtful consideration and
16 the time it will afford us to pursue our consideration of an
17 appeal. Thank you.

18 THE COURT: So, I will issue the opinion very quickly
19 and then I will wait to hear what you are going to do.

20 MS. NASH: Thanks you, your Honor.

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